

83 - 670

No.

Office - Supreme Court, U.S.

FILED

OCT 21 1983

ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RODNEY H. GUNTER - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
COMMONWEALTH OF KENTUCKY

FRANK E. HADDAD, JR.

529 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the trial court committed reversible error and violated the Petitioner's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process of law by permitting the prosecutor to reopen the case and introduce evidence through cross-examination of the Petitioner about a previous, unrelated encounter with another person that occurred three to four hours before the shooting with which the Petitioner was charged.

II. Whether the trial court committed reversible error and violated the Petitioner's Sixth Amendment right to due process of law by refusing the Petitioner's tendered self-defense instruction and by submitting an improperly qualified instruction that was not supported by the evidence to the jury.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1- 2
Constitutional and Statutory Provisions	2- 3
Statement of the Case	3- 7
Reasons for Granting the Writ	7-20
Conclusion	21
Appendix	23-28
A. Court of Appeals of the Commonwealth of Kentucky, Judgment Affirming Petitioner's Conviction	23-26
B. Court of Appeals of the Commonwealth of Kentucky, Order Denying Petition for Rehearing..	27
C. Supreme Court of Kentucky, Order Denying Discretionary Review	28

TABLE OF AUTHORITIES

Constitutional Provisions:

	PAGE
United States Constitution, Sixth Amendment	2, 9
United States Constitution, Fourteenth Amend- ment	2-3, 9, 10

Statutes:

Federal Rules of Evidence 404(b)	3, 13, 14
--	-----------

Cases:

<i>Arnett v. Commonwealth</i> , Ky., 470 S. W. 2d 834 (1971)	10, 13, 14
<i>Abernathy v. Commonwealth</i> , Ky., 439 S. W. 2d 949 (1969)	20
<i>Benton v. Maryland</i> , 395 U. S. 784, (1969)	14
<i>Burke v. Commonwealth</i> , Ky., 249 S. W. 2d 764 (1952)	18
<i>Cupp v. Naughten</i> , 414 U. S. 141 (1973)	20
<i>Duncan v. Louisiana</i> , 391 U. S. 145 (1968)	14
<i>Hendrickson v. Commonwealth</i> , Ky., 486 S. W. 2d 55 (1972)	8, 10, 13, 14
<i>Malloy v. Hogan</i> , 378 U. S. 1 (1964)	14
<i>Michelson v. United States</i> , 335 U. S. 469 (1948)	11, 13
<i>Pace v. Commonwealth</i> , Ky., 561 S. W. 2d 664 (1978) . .	16
<i>Stepp v. Commonwealth</i> , Ky., 608 S. W. 2d 371 (1979)	18, 19
<i>Sumner v. Commonwealth</i> , Ky., 261 S. W. 2d 633 (1953)	19
<i>United States v. Clemons</i> , 676 F. 2d 122 (5th Cir. 1982)	14
<i>United States v. Dunbar</i> , 614 F. 2d 39 (5th Cir.), cert. denied 447 U. S. 926 (1980)	14
<i>United States v. Thomas</i> , 632 F. 2d 837 (10th Cir.) cert. denied 449 U. S. 960 (1980)	14
<i>Washington v. Texas</i> , 388 U. S. 14 (1967)	14

Miscellaneous:

Krivosha, Lansworth, Pirsch, <i>Relevancy: The Nec- essary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict</i> , 60 Neb. L. Rev. 657 (1981)	11, 13
1 Wigmore, <i>Evidence</i> , 3d Ed. (1940)	12

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

RODNEY H. GUNTER - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
COMMONWEALTH OF KENTUCKY**

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals of the Commonwealth of Kentucky decided and filed on December 17, 1982.

OPINION BELOW

The opinion of the Court of Appeals decided and filed on December 17, 1982, was designated "Not To Be Published" by the court (Appendix A). A Petition for Rehearing was filed and denied. (Appendix B). A Motion for Discretionary Review to the Supreme Court of Kentucky was filed on April 12, 1983, and denied on August 24, 1983. (Appendix C).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The judgment of the Court of

Appeals is the final judgment rendered by the highest court of the Commonwealth of Kentucky in which a decision could be had. The Motion for Discretionary Review to the Kentucky Supreme Court was denied on August 24, 1983. See, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Sixth Amendment to the United States Constitution provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides as follows:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions:

Federal Rules of Evidence 404(b) provides as follows:

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

The Petitioner, RODNEY H. GUNTER, was convicted of manslaughter in the second degree because he attempted to protect himself from the threatening and violent behavior of the deceased, Michael Wayne Thomas.

The events leading up to the shooting of the deceased began when the Petitioner and his cousin, Tommy Redfern, the driver of the vehicle, were driving down Red Oak Drive in Jefferson County, Kentucky, when a crowd of people at the intersection at Brenda Drive started yelling obscenities at the Petitioner and his cousin. [Transcript of Evidence, hereinafter designated as T.E.] [T.E., pp. 201-202.] Mr. Redfern proceeded to drive the car past the crowd then stopped a couple of houses down and told the

Petitioner to get out of the car and fire a shot into the air with the gun that Redfern kept in the glove compartment of his car. The Petitioner got out of the car and fired a shot into the air as requested by Redfern. [T.E., p. 202.]

At this time, Michael Wayne Thomas, the deceased, yelled at the Petitioner and Redfern to come back if they wanted to fight. [T.E., p. 202.] Mr. Redfern then backed the car up and started arguing with the deceased.

The deceased then walked over to the car, reached in through the passenger window where the Petitioner was seated, and started striking the Petitioner and grabbing at Redfern, trying to pull Redfern out of the car. [T.E., p. 203.] At this point, Redfern got out of the vehicle, met the deceased at the front of the car and struck him with a set of nunchakus when the deceased attempted to grab him.

After unsuccessfully trying to grab Redfern several times, the deceased backed off and grabbed a large iron pipe with which to fight. Redfern ran back to the car, got in on the driver's side, and was attempting to leave when the deceased began smashing the front windshield out of the vehicle with the big iron pipe. [T.E., p. 204.]

As the deceased was standing on the passenger side of the car, next to the Petitioner, and smashing the front windshield out of the car, Redfern was pushing the Petitioner over toward the passenger side of the car and ordering the Petitioner to shoot the deceased. [T.E., p. 204.] The Petitioner then picked up the gun,

which he had placed on the car seat, and told the deceased to stop, that they had a gun. At this point, the deceased did not stop, but, rather, took the large iron pipe and attempted to thrust it into the passenger window of the car and strike the Petitioner. [T.E., pp. 204-205.] The Petitioner, in fear for his life, fired one shot, killing the deceased.

It is most important for this Court to note that the deceased was a very powerfully built man, over six feet tall, and weighed over 220 pounds. Furthermore, the weapon he used to smash the front windshield out of the vehicle was an iron pipe of eight to ten feet in length and easily capable of producing death or serious physical injury. In addition, the testimony demonstrated that the Petitioner did not get out of the car to fight with the deceased.

The July, 1981, term of the Jefferson County Grand Jury returned a two count indictment charging the Petitioner, RODNEY H. GUNTER, with one count of manslaughter in the second degree.

The Petitioner's trial was conducted on October 22 and 23, 1981, in the Ninth Division of the Jefferson Circuit Court. At trial, the following errors occurred which effectively denied the Petitioner of his Fourteenth Amendment right to due process of law and his Sixth Amendment right to a fair and impartial trial.

The trial court committed reversible error in allowing the prosecutor for the Commonwealth to reopen the case and recall the Petitioner to the stand to testify about an entirely separate incident with another individual some three to four hours prior to the time of

the shooting in an attempt to show the Petitioner's intent or motive.

Defense counsel strenuously objected to this testimony on the grounds that anything that may have happened between the Petitioner and an unrelated third party some three to four hours earlier had absolutely nothing to do with the shooting of the deceased and was, therefore, not relevant and highly prejudicial.

MR. HADDAD: Let the record show that we have objected to the introduction of this testimony and we have cited to the Court, *Hendrickson v. The Commonwealth*, 486 S. W. 2d 55, and furnished the Court with a full copy of that opinion which, we contend, clearly supports our objection to the introduction of this evidence, on grounds that anything that may have happened between this defendant and another person some four hours before this occurrence, is not relevant and is prejudicial and not admissible as evidence in this case. [T.E., p. 256.]

The trial court overruled counsel's objection and opted to reopen the case and recall the Petitioner to the stand. [T.E., p. 256.]

The trial court also committed reversible error by refusing to accept the Petitioner's tendered instruction on self-protection and by submitting to the jury an improper instruction on self-protection.

After both sides concluded closing arguments, the case went to the jury. On October 23, 1981, the jury returned a verdict of guilty on the charge of manslaughter in the second degree and recommended pun-

ishment as confinement in the penitentiary for five years.

The Petitioner appealed this conviction and raised these issues to the Court of Appeals. In an opinion rendered December 17, 1982, the Court of Appeals affirmed the conviction, Judge Wilhoit dissenting. A Petition for Rehearing was timely filed on January 6, 1983. This Petition was denied, March 25, 1983, Judge Wilhoit again dissenting. The Supreme Court of Kentucky denied Discretionary Review on August 24, 1983.

REASONS FOR GRANTING THE WRIT

- I. The Trial Court Committed Reversible Error and Denied the Petitioner's Sixth Amendment Right to a Fair Trial and Fourteenth Amendment Right to Due Process of Law by Permitting the Prosecutor to Reopen the Case and Introduce Evidence Through Cross-Examination of the Petitioner About a Previous Unrelated Encounter With Another Person Three to Four Hours Earlier in the Evening of the Incident.**

The trial court allowed the prosecutor to reopen the case and recall the Petitioner to the stand for further questioning about the Petitioner's whereabouts earlier in the evening on the day of the incident. Counsel for the Petitioner objected to the introduction of this testimony on the ground that such evidence was not relevant and was highly prejudicial to the Petitioner. The prosecutor contended that the testimony was relevant to show the Petitioner's state of mind at the time of the incident, which occurred three to four hours later. [T.E., p. 231.] The trial court ruled that

the testimony was admissible to show the Petitioner's state of mind. [T.E., p. 233.] The admission of this evidence was error, to the substantial prejudice of the Petitioner.

The testimony was not relevant to the facts at issue in the Petitioner's trial. The testimony elicited from the Petitioner by the prosecutor revealed only that, three to four hours before Michael Wayne Thomas was shot, the Petitioner had an argument with another individual, named Mark, about a girl. The Petitioner testified that Mark had told him to keep away from the girl. [T.E., p. 233.] The Petitioner testified that, hours later, he was in the automobile with his cousin looking for Mark to talk with him. [T.E., p. 251.]

The testimony was clearly prejudicial to the Petitioner. By it, the prosecutor was able to put facts and circumstances before the jury that were not relevant, but that showed, possibly, the Petitioner's "propensity" for argument. Counsel for the Petitioner strenuously objected to the testimony on the ground that what may have happened between the Petitioner and Mark some three to four hours earlier had absolutely nothing to do with the shooting of the deceased and was not relevant, and was highly prejudicial. [T.E., p. 256.] Counsel submitted the case of *Hendrickson v. Commonwealth*, Ky., 486 S. W. 2d 55 (1972) to the court. In *Hendrickson* the Kentucky Supreme Court (formerly Court of Appeals) had ruled that evidence that a defendant threatens person A because of a grievance with A is simply not relevant in the trial

of whether the defendant subsequently shot person B over an entirely different grievance.

The trial court overruled counsel's objection, reopened the case, and recalled the Petitioner to the stand. Therefore, the prejudicial and irrelevant evidence was admitted.

The Court of Appeals affirmed the conviction of the Petitioner. The court relied upon the fact that the trial judge gave an admonition to the jury in regard to the relevancy of the testimony, and determined that the admission of the testimony did not constitute reversible error. [App., p. 25.] The admonition did not cure the error, and the decision of the Court of Appeals should be reversed.

The Sixth Amendment to the United States Constitution states, in pertinent part, that:

In all criminal prosecutions, the accused shall enjoy the right to . . . a trial . . . by an impartial jury. . .

The Fourteenth Amendment states, in pertinent part, that:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law;

It is established in the common and statutory law of this nation's courts that evidence of unrelated prior acts are not admissible where the introduction of such evidence substantially prejudices the defendant. The introduction of such testimony deprives the defendant of his or her Sixth Amendment right to a fair trial,

and Fourteenth Amendment right to due process of law.

The Courts of the Commonwealth of Kentucky recognize this principle, and Judge Wilhoit dissented from the court's decision affirming the Petitioner's conviction, on the ground that the trial court erred in admitting the irrelevant and prejudicial testimony. [App., p. 26.] The Court of Appeals should not have affirmed the Petitioner's conviction, the Judge stated, because, "Considering the evidence as a whole, I believe this evidence was very prejudicial to the defense and that the court's admonition was not sufficient to cure the prejudice." [App., p. 26.]

The court in *Hendrickson* had relied upon an earlier Kentucky decision in *Arnett v. Commonwealth, Ky.*, 470 S. W. 2d 834 (1971), where it was held that, in a murder prosecution, evidence that the defendant had pulled a pistol on a third party several hours before a homicide should not have been admitted at the trial for the homicide. The evidence, the court concluded, did not establish identity, guilty knowledge, intent, or motive, and was therefore, not relevant. *Id.* at 836.

The prosecution in this case argued that the evidence of the earlier argument between the Petitioner and a third party was relevant to the Petitioner's intent at the time of the shooting. The Court of Appeals accepted this argument. At best, however, the evidence explains the "intent" of the Petitioner to drive in an automobile with his cousin and look for the third party. The evidence does *not* explain or describe the Peti-

tioner's intent or state of mind in regard to (a) the deceased, or (b) the argument with the deceased. Certainly, evidence of the Petitioner's intent to drive in an automobile and search for a third party does not explain the Petitioner's state of mind as he sat helplessly in the front seat of the automobile as the deceased bashed the windshield with a heavy iron pipe.

It is fundamental that a defendant in a criminal trial cannot be convicted upon the basis of evidence that he is a "bad" or "argumentative" person and is therefore deserving of reprobation and punishment by society. See Krivosha, et al., *"Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict"*, 60 Neb. L. Rev. 657, 658 (1981). If a defendant is to have the benefit of the presumption of innocence and is to be afforded a fair and impartial trial according to the Sixth Amendment, the defendant must be insulated from factors which are irrelevant to the charges against him. The testimony about the prior argument between the Petitioner and a third party interfered with these rights, and the admonition to the jury did not cure this prejudice.

In *Michelson v. United States*, 335 U. S. 469 (1948), this Court was presented with a similar case. The prosecutor in *Michelson* cross-examined four of the defendant's character witnesses, and, in the process, introduced evidence of the defendant's arrests, twenty years prior, for unrelated crimes. *Id.* at 472. The Court recognized that this evidence, like the evidence improperly admitted in the Petitioner's trial, was in-

tended to sway the jurors by the implication that the defendant had an "evil" character, or that he had a propensity to commit crimes. The Court held that:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *Id.* at 475.

The Court stated that the evidence is not excluded because it is irrelevant, but because it naturally carries so much weight with the jury as to "overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* at 476.

The overriding policy of excluding such evidence despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. 1 Wigmore, Evidence 3d Ed. (1940) § 57.

Id. The evidence introduced at the Petitioner's trial was calculated to persuade the jury that the Petitioner was an argumentive person of bad character, and should have been excluded. Although the prosecutor did not describe the evidence as "character" evidence, the prosecutor's assertion that it was introduced to explain the Petitioner's intent is unreasonable in light of the fact that, at best, the evidence explained only why the Petitioner was driving in an automobile, not why he reacted in fear for his life when the deceased threatened him and his cousin with the iron pipe.

The Federal Rules of Evidence, adopted 25 years after this Court's decision in *Michelson*, apply the same standard of scrutiny to evidence introduced to persuade the jury to convict a defendant on evidence unrelated to the charges against him or her. Rule 404(b) states:

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Although Kentucky has not formally adopted the Federal Rules of Evidence, it is clear from the decisions in *Hendrickson* and *Arnett* that the spirit of 404(b) is respected and enforced. Since 1973, over 20 states have enacted rules of evidence that are identical to, or substantially conform to, the Federal Rules, including 404(b). See, *Krivosha, supra*, n. 5 at 658.

Fed. R. Evid. 404(b) has been broadly construed so as to effectuate the intent of the drafters to protect defendants from conviction upon evidence unrelated to the charge against them. The courts have established the rule that:

Evidence of an extrinsic offense is inadmissible unless it is relevant to an issue other than defendant's character, is not substantially outweighed by its undue prejudice, and the evidence otherwise satisfies Fed. R. Evid. 403 (does not confuse the

issues, mislead the jury or needlessly delay the trial).

See e.g., *United States v. Clemons*, 676 F. 2d 122, 123 (5th Cir. 1982); *United States v. Dunbar*, 614 F. 2d 39, 42 (5th Cir.), cert. denied, 447 U. S. 926 (1980); *United States v. Thomas*, 632 F. 2d 837 (10th Cir.), cert. denied, 449 U. S. 960 (1980).

Petitioner submits that fundamental fairness requires that this rule be applied to the evidence admitted in error by the trial judge. Clearly, the conviction of the Petitioner was based upon the admission of evidence that would have been excluded under a proper application of the standard required by the Kentucky courts in *Hendrickson* and *Arnett* and by the federal courts via the application of Rule 404(b) and the policy in *Michelson*. This Court should not permit his conviction to stand, therefore, because the conviction resulted from a "watered down" application of the Petitioner's right to a fair trial and due process of law.

Petitioner requests this Court to determine whether the Petitioner's trial was conducted with due process of law, according to the mandate established by this Court's decisions in *Malloy v. Hogan*, 378 U. S. 1 (1964), *Washington v. Texas*, 388 U. S. 14 (1967), *Duncan v. Louisiana*, 391 U. S. 145 (1968), and *Benton v. Maryland*, 395 U. S. 784 (1969). In *Benton*, Justice Marshall summarized this standard of review:

Recently, however, this Court has increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law. In an in-

creasing number of cases, the Court has rejected the notion that the Fourteenth Amendment applies to the States only a watered down, subjective version of the individual guarantees of the Bill of Rights. [citations omitted.]

395 U. S. at 794. The Petitioner's trial was not conducted with due process of law. The Petitioner has proved that the prosecutor's sole justification for the admission of the evidence, that it demonstrated "intent", is without merit. Although the states are at liberty to establish higher standards of criminal procedure, they are not at liberty to admit evidence that falls far below the minimal standards established by this Court.

II. The Trial Court Committed Reversible Error by Refusing the Petitioner's Tendered Self Defense Instruction and by Submitting an Improperly Qualified Instruction That Was Not Supported by the Evidence to the Jury.

At trial the Petitioner tendered the following instruction upon self-protection:

DEFENDANT'S REQUESTED INSTRUCTION No. _____
SELF DEFENSE:

If at the time the Defendant caused the death of Michael Wayne Thomas, he believed that Michael Wayne Thomas was then and there about to use physical force upon him he was privileged to use such physical force against Michael Wayne Thomas as he believed to be necessary in order to protect himself from it, but including the right to use deadly force in so doing only if

he believed it was necessary in order to protect himself from death or serious physical injury at the hands of Michael Wayne Thomas.

“Physical force” means force used upon or directed toward the body of another person.


“Deadly physical force” means force which is used for the purpose of causing death or serious physical injury or which the defendant knows to create a substantial risk of causing death or serious physical injury.

“Serious physical injury” means physical injury which creates a substantial risk of death, or causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss of impairment of the function of any bodily organ.

Before such an instruction can be properly submitted to the jury, the trial court is required to find that there was sufficient evidence of an attack on the accused to warrant this defense.

The real question which must be answered in cases of this type is not whether the theory asserted by the accused at trial is logically consistent with the defense of self-protection, but is rather whether there was sufficient evidence of an attack on the accused to justify submission of an instruction on self-protection. *Pace v. Commonwealth, Ky.*, 561 S. W. 2d 664 (1978).

It is undisputed that the evidence in this case clearly reflected that the deceased attacked the car in which the Petitioner was sitting and was smashing the windshield in front of the Petitioner's face with an iron bar. [T.E., p. 204.]



The trial court submitted the following self-protection instruction with qualifications to the jury.

NO. 4 — SELF-PROTECTION

If at the time the defendant shot and killed Michael Wayne Thomas he believed that Michael Wayne Thomas was about to use physical force upon him, he was privileged to use such physical force against Michael Wayne Thomas as he believed to be necessary in order to protect himself against it, but including the right to use deadly physical force in so doing only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hands of Michael Wayne Thomas, and subject to these qualifications:

(1) *Regardless of what the defendant then believed, if you believe from the evidence beyond a reasonable doubt the following:*

(a) That it was not in fact necessary for him to use any physical force against Michael Wayne Thomas in order to protect himself or, if it was, he used more than was actually necessary;

AND

(b) That his belief to the contrary and the action he took against Michael Wayne Thomas in reliance upon that belief amounted to:

(i) Reckless conduct, then he was not so privileged, and you will find him guilty of reckless homicide under Instruction No. 2;

OR

(ii) Wanton conduct, then he was as not so privileged, and you will find him guilty of

second-degree manslaughter under Instruction No. 1.

“Physical force” means force used upon or directed toward the body of another person.

“Deadly physical force” means force which is used for the purpose of causing death or serious physical injury or which the defendant knows to create a substantial risk of causing death or serious physical injury.

“Serious physical injury” means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ. [Emphasis added.]

It is well-settled law in Kentucky that before the trial court may qualify or limit the instructions to the jury the trial judge must find as a matter of law that there is sufficient evidence to justify such limitations before instructing the jury. *Stepp v. Commonwealth*, Ky., 608 S. W. 2d 371 (1979). Further, an instruction qualifying the right of self-protection or self-defense which gives undue prominence and emphasis to the evidence of the Commonwealth is wholly improper. *Burke v. Commonwealth*, Ky., 249 S. W. 2d 764 (1952).

In the instant case, the instruction tendered by the Petitioner and the instruction given by the trial court are identical except for the qualifications made by the trial court. These qualifications are improper and totally negated the effect of the self-protection instruction. The crux of a self-protection defense is a good-faith belief on the part of the accused that force, deadly

or otherwise, is necessary to protect himself from death or serious physical injury. *Stepp, supra*.

The rule is well established that the instructions must authorize the absolving of the defendant if the danger or the necessity to act was *either real or to the defendant apparent*. *Sumner v. Commonwealth, Ky.*, 261 S. W. 2d 633 (1953). If it is found that the accused did, in fact, harbor a good-faith belief that he was in danger of death or serious physical injury, he is entitled to protect himself. If his belief is not in good faith, then he is not entitled to such a defense. The qualifications added to the instructions submitted to the jury by the trial court totally distorted and negated the self-protection instruction by stating *regardless* of what the defendant believed the jury may find that he was not entitled to protect himself. The qualifications improperly make the test of self-protection the belief of impending danger in the minds of the jury after reviewing the evidence, not the belief in the mind of the accused at the time of the attack. Such qualifications emasculate the defense of self-protection and result in reversible error.

Further, the trial court gave undue emphasis to the Commonwealth's theory of the case by repeating second degree manslaughter and reckless homicide instructions that had already been given to the jury even though portions of the second degree manslaughter and reckless homicide instructions stated that the jury must find that the accused was not privileged to act in self-protection to be convicted of these offenses. (Trial court's Instruction No. 4, subsections 1(b)(i) and (ii).

In affirming Petitioner's conviction the Court of Appeals relied on *Abernathy v. Commonwealth*, 439 S. W. 2d 949 (1969) in holding that there was no reversible error at Petitioner's trial. [App., p. 25.] In *Abernathy* the court explained what it meant by substantial, or reversible, error:

What it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held non-prejudicial. *Abernathy*, 439 S. W. 2d at 952.

The conflicting and unconvincing evidence presented by the Commonwealth, coupled with the prejudicial and irrelevant testimony about an unrelated incident that occurred hours before the shooting and the prejudicially qualified instructions on self-defense, present a "substantial possibility" that the result in this case should be different. This possibility prompted Judge Wilhoit to dissent from the decision affirming Petitioner's conviction.

This Court has determined that jury instructions given in state criminal proceedings must conform to certain established notions of fairness and due process. See, *Cupp v. Naughten*, 414 U. S. 141 (1973). The instructions given by the trial judge resulted in prejudice and Constitutional error, and the decision of the Court of Appeals should be reversed.

CONCLUSION

For these reasons Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky for the purpose of reviewing the decision of that court affirming the conviction of the Petitioner upon evidence improperly admitted and upon instructions improperly qualified.

Respectfully submitted,

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881

Counsel for Petitioner

APPENDIX

APPENDIX A

OPINION RENDERED: DECEMBER 17, 1982; 10.00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 82-CA-412-MR

RODNEY H. GUNTER - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Hon. Charles M. Leibson, Judge
Action No. 81-CR-0790

AFFIRMING

BEFORE: HOGGE, WILHOIT, and WINTERSHEIMER, Judges.
WINTERSHEIMER, JUDGE. This appeal is from a judgment entered November 24, 1981, based on a jury verdict convicting Gunter of second-degree manslaughter, and imposing a sentence of five years in prison.

The questions presented are whether the verdict was based on sufficient evidence, whether the trial court properly allowed limited cross-examination of the appellant, whether the prosecutor's closing argument contained misstatements of testimony, and whether the instruction on self-protection was correct.

On April 17, 1981, at the intersection of Brenda and Red Oak, a fight occurred which resulted in the death of one person. Gunter and his cousin Redfern were driving near the intersection when a crowd of people on the corner were yelling vulgarities and obscenities at them. Redfern

drove the car past the crowd and then stopped and backed up. Gunter got out of the car and fired a shot in the air. The deceased challenged the occupants of the car to a fight. Redfern, the driver, got out of the vehicle and began to strike the deceased with a set of nunchakus when the deceased tried to grab him. The deceased backed off and obtained a large iron pipe and began smashing it on the windshield of the vehicle. Redfern was in the driver's side of the car, urging Gunter to shoot the deceased. Gunter shot the deceased in the right side, killing him. After a two-day trial, Gunter was convicted of manslaughter in the second degree.

Gunter maintains that he was convicted of manslaughter because he attempted to protect himself from the threatening and violent behavior of the deceased, and was in fear of his life.

The unanimous jury verdict was based on sufficient evidence of probative value. Six eye-witnesses testified to the incidents that occurred on April 17, 1981. There is sufficient evidence that the deceased had turned and was moving away from the car at the time Gunter shot him in the right side. The testimony of O'Bannon, Thomas, Gibson and Baum indicates that the victim turned and was leaving the affray when Gunter shot him. The skillful cross-examination by Gunter's counsel did not change their accounts of the incidents. It is the responsibility of the jury to fairly resolve any alleged conflicts in the testimony and to draw reasonable inferences from the basic facts to the ultimate facts. Here the jury correctly performed that function, reaching the factual conclusion that the evidence supported the ultimate decision that Gunter was not acting in self-defense at the time of the fatal shot. See, *Watkins v. Commonwealth*, Ky., 287 S. W. 2d 416 (1956), and *Jackson v. Virginia*, 443 U. S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

The trial judge correctly permitted limited cross-examination of the appellant with regard to where he was going at the time of the incident. Gunter was allowed to testify that he and his cousin were on their way to see an individual named Mark who they had had an unpleasant encounter with earlier that afternoon over a particular girlfriend. The trial judge gave an admonition to the jury in regard to the relevancy of the testimony. In view of all the circumstances, we do not believe there is any reversible error. *See, Abernathy v. Commonwealth, Ky.*, 439 S. W. 2d 949 (1969).

The prosecutor's closing argument did not contain serious misstatements of the testimony. The majority of the witnesses stated that the deceased turned to run away. Gunter stated that the deceased turned, but only so that he could swing the large iron pipe again. While the prosecutor's statement was not totally accurate, it does not appear to be a gross or intentional misstatement. The error, if any, does not rise to the level which could be considered prejudicial or require reversal. *Niemeyer v. Commonwealth, Ky.*, 533 S. W. 2d 218 (1976).

The trial court's instruction on self-defense was proper. *See, 1 J. Palmore, Kentucky Instructions to Juries* § 10.26 (1975). The only difference between the instructions tendered by the appellant and those given by the trial judge on self-protection was the qualification made by the trial court, "Regardless of what the defendant then believed." The trial judge must find as a matter of law that there is sufficient evidence to justify limitations before instructing the jury. *Mayfield v. Commonwealth, Ky.*, 479 S. W. 2d 578 (1972). Here there was evidence to suggest that Gunter did not need physical force to protect himself. A majority of the testimony points to that fact because once the deceased heard that there was a gun involved, he turned away.

There was no reversible error in the instruction as given.
KRS 503.120.

The judgment is affirmed.

HOGGE, Judge, CONCURS.

WILHOIT, Judge, DISSENTS by separate opinion.

WILHOIT, JUDGE, DISSENTING. I respectfully dissent because I believe the trial court erred in admitting the evidence concerning where the appellant was going at the time he arrived at the scene of the shooting. *Hendrickson v. Commonwealth*, Ky., 486 S. W. 2d 55 (1972). Considering the evidence as a whole, I believe this evidence was very prejudicial to the defense and that the court's admonition was not sufficient to cure the prejudice.

Attorney for Appellant:

FRANK E. HADDAD, JR.
529 Kentucky Home Life Bldg.
Louisville, Kentucky 40202

Attorneys for Appellees:

STEVEN L BESHEAR
Attorney General

STEPHEN L. FRANK
Assistant Attorney General
State Capitol
Frankfort, Kentucky 40601

APPENDIX B
COURT OF APPEALS OF KENTUCKY
No. 82-CA-412-MR

RODNEY H. GUNTER - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Kenneth Corey, Judge

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOGGE, LESTER and WILHOIT, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

LESTER, J., CONCUR; WILHOIT, J., DISSENT.

Entered: March 25, 1983

(s) E. M. Hogge
 Judge, Court of Appeals

APPENDIX C
SUPREME COURT OF KENTUCKY
83-SC-288-D
(82-CA-412-MR)

RODNEY H. GUNTER - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

Jefferson Circuit Court
81-CR-0790

ORDER DENYING DISCRETIONARY REVIEW

The motion of Rodney H. Gunter for a review of the decision of the Court of Appeals is denied.

Stephens, C.J., and Aker, Gant, Stephenson, and Vance, JJ., sitting.

Entered August 24, 1983.

(s) Robert F. Stephens
Chief Justice